

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER: 01-0352
State Gross Retail Tax
For Tax Years 1998-2000**

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ISSUE

I. State Gross Retail Tax—Public Transportation Exemption

Authority: IC 6-2.5-5-27
45 IAC 2.2-5-61(b), (g)

Taxpayer protests the assessment of tax on various purchases of equipment and supplies that taxpayer believes were used to administer the business of public transportation.

II. Tax Administration—Abatement of Penalty

Authority: IC 6-8.1-10-2.1(d)
45 IAC 15-11-2(c)

Taxpayer protests imposition of a ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the business of rendering public transportation and warehousing perishable food products by means of its "cold" transportation equipment and facilities. Taxpayer uses refrigerated trucks that are owned by taxpayer to transport the frozen food products from a location designated by taxpayer to its cold storage facilities. At a later date, upon receipt of further shipping instructions, taxpayer transports the goods from its storage facilities to the location designated by the customer. The customer pays an arranged fee for the transportation services.

Taxpayer's cold storage facilities are used to warehouse the customer's goods. Just as the perishable goods must be carried in temperature-controlled refrigerated trucks, so too must the goods be maintained in temperature controlled facilities at taxpayer's cold storage facilities during the storage, handling, and transfer phase of the transportation journey. Warehousing of specific goods is usually for no longer than one to two weeks; however, some contracts with customers

provide that taxpayer will warehouse certain seasonal goods for a few months. A special warehousing fee is charged to storage customers who contract for the warehousing of seasonal goods. From time-to-time, a transportation customer may incur an additional separately stated storage surcharge if its goods remain within taxpayer's cold storage facility for longer than the normal period of transfer and handling time.

The Department agreed that taxpayer is engaged in public transportation. However, the Department assessed tax on items used by taxpayer in its cold storage facility because the Department found that the cold storage area is used for warehousing goods and not for the temporary storage of goods in public transportation. These items included utilities, forklift trucks and various repair parts for the forklift trucks, handheld computers that verify the receipt of shipments and keep inventory, and various office supplies. Taxpayer argues that whereas it does provide storage service to certain storage customers, the storage service is temporary in nature.

I. State Gross Retail Tax—Public Transportation Exemption

DISCUSSION

The definition of public transportation is found at 45 IAC 2.2-5-61(b) as follows:

Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

If a person acquiring tangible personal property or services directly uses or consumes the property or services in providing public transportation for persons or property, the transactions involving the tangible personal property and services are exempt from the state gross retail tax. *See* IC 6-2.5-5-27. "Property directly used for temporarily storing persons or property being transported is exempt from tax because temporary storage is considered to be an integral part of rendering transportation." 45 IAC 2.2-5-61(g).

Here, taxpayer is a public transportation company that transports frozen foods for customers. Taxpayer picks up the goods at the customer's location and delivers them to taxpayer's cold storage facilities. Taxpayer imposes a separately stated "storage surcharge" in addition to the transportation/cartage charges if, for any reason, the customer's goods are held at taxpayer's cold

storage facility for longer than the normal period of transfer and handling time. Upon receipt of further shipping instructions from the customer, the goods are delivered by the taxpayer to the customer's designated final destination. Based upon the facts of the instant case, the question before us becomes whether or not taxpayer's storage (*i.e.*, warehousing) activities constitute the temporary storage of property in transit such that the equipment and supplies consumed in maintaining the storage facility are exempt from sales tax because they are an integral part of taxpayer's public transportation service.

45 IAC 2.2-5-61(g) gives several examples of temporary storage facilities which would qualify for exemption from the gross retail tax. Some of these examples include facilities to store airline passengers' luggage until it can be loaded on a plane, and a carrier temporarily storing property until it can be loaded for further shipment.

The Department defines "temporary storage of persons or property in transit" as that storage required by the public transportation company to facilitate the routine transfer of persons or property between public transportation carriers or equipment or as required by unanticipated delays. The Department does not consider storage that is requested by the person for whom public transportation is performed (*i.e.*, taxpayer's customers) to be temporary storage of persons or property in transit. Such storage is a service performed for the customer after public transportation has ceased. Subsequent shipment begins the public transportation activity anew.

In the instant case, the storage provided by taxpayer is requested by taxpayer's customers for the customers' own convenience. As such, the storage service performed by taxpayer is not "temporary storage of persons or property in transit", but instead constitutes storage unrelated to the public transportation business. Therefore, the cold storage facility including the equipment and supplies consumed in maintaining it are subject to sales or use tax.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Abatement of Penalty

DISCUSSION

The Department determined that a ten percent (10%) negligence penalty should be imposed upon taxpayer. Taxpayer disagrees with the imposition of said penalty.

Under IC 6-8.1-10-2.1(d), the Department is empowered to waive the ten-percent negligence penalty if the taxpayer can establish that its failure to pay the tax deficiency was due to reasonable cause and not due to willful neglect. Under 45 IAC 15-11-2(c), in order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed. Ignorance of the listed tax laws, rules, and/or regulations is treated as negligence. Factors which may be considered to determine reasonable cause include the nature of the tax involved, judicial precedents set by Indiana courts, judicial precedents established by jurisdictions outside Indiana,

published Department instructions, information bulletins, letters of findings, rulings, and letters of advice. 45 IAC 15-11-2(c).

Taxpayer was the subject of a prior audit by the Department in 1997 that addressed whether or not taxpayer was entitled to the public transportation exemption. Following taxpayer's protest of the issues of the prior audit, and a subsequent hearing, a letter of findings was issued stating that taxpayer was not entitled to the public transportation exemption. Thereafter, taxpayer chose to discount the Department's determination and continued to make purchases for its cold storage facility in adherence with its previous interpretation of the tax laws and regulations (*i.e.*, no sales or use tax was paid on the purchases). Although taxpayer chose not to appeal the Department's finding, it undoubtedly realized that something was amiss. However deeply felt its position may have been, taxpayer's decision to ignore the results of the prior audit takes that decision out of the "ordinary business care" standard necessary for the Department to grant the taxpayer's request to waive the penalty.

FINDING

Taxpayer's protest is respectfully denied.

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